

COMMONWEALTH OF MASSACHUSETTS  
HOUSING APPEALS COMMITTEE

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G-R HIGHLAND GLEN LTD.  
PARTNERSHIP,

Appellant

v.

WESTWOOD BOARD OF APPEALS,  
Appellee

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No. 02-17

**ORDER**

This is an appeal regarding affordable housing at Highland Glen in Westwood. Two matters are currently before the Committee—a motion by abutters to intervene pursuant to 760 CMR 30.04 and a motion for partial summary judgment by the developer of the proposed housing.

In 2001, the developer, G-R Highland Glen Limited Partnership, applied to the Westwood Board of Appeals for modification of a comprehensive permit issued to its predecessor in 1976 with regard to a site at 1055 Highland Road in Westwood. Pursuant to that permit, a development of 180 units of affordable rental housing for people 55 years of age and older had been built. On June 20, 2002, after notice and hearing, the Board granted the application for modification with conditions, permitting the development of an additional 138 units of housing on unused portions of the site. The developer appealed to this Committee, alleging that the conditions rendered the proposal uneconomic.

On August 30, 2002, pursuant to 760 CMR 30.09(4), this Committee opened its hearing with a conference of counsel. The conference was attended by counsel for the parties and also by several abutters to the development site, who on July 26, 2002 had filed a “Joint Motion to Intervene,” alleging certain specific concerns. The abutters not only challenged the approval of the additional housing because of its proximity to their properties, and but also raised the legal question of whether the Board had the authority to amend the 1976 permit.

### **MOTION FOR PARTIAL SUMMARY JUDGMENT**

On February 14, 2003, the developer filed a Motion for Partial Summary Judgment asking the Committee “rule, as a matter of law, that the Town of Westwood Board of Appeals was empowered to modify the conditions set forth in the original comprehensive permit....” The intent of this motion is clear. It is to dispose of the preliminary legal question of the authority of the Board to approve modification of a comprehensive permit prior to beginning the factual inquiry into the appropriateness of the particular modification approved in this case. A motion for partial summary judgment may not be the most logical vehicle for raising this legal issue. If the abutters were represented by counsel, it is likely that the same issue would have been raised by them in a motion to dismiss. But in an administrative proceeding such as this, in the interest of simplifying the hearing process, since the issue has been joined, I will address it, regardless of the form of the motion.

Generally, actions of local boards regarding land use—variances, special permits, and subdivisions—may be modified. See G.L. c. 40A, § 11, para. four; c. 41, § 81W.

Substantive changes require notice and hearings. See *Huntington v. Zoning Board of Appeals of Hadley*, 12 Mass.App.Ct. 710, 714 n.4, 428 N.E.2d 826, 829, n.4 (1981); *Fish v.*

*Building Inspector of Falmouth*, 357 Mass. 774, 775, 258 N.E.2d 743 (1970); *Chambers v. Building Inspector of Peabody*, 40 Mass.App.Ct. 762, 767, 667 N.E.2d 895, 899 (1996).

Under the Comprehensive Permit Law, the local board of appeals has “the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application.” G.L. c. 40B, § 21. In addition, the Committee’s regulations permit either the Board or the Committee to approve changes in “the details of [the developer’s] proposal,” whether they are “substantial or insubstantial.” 760 CMR 31.03(3). There is no reason that such changes cannot include the construction of additional housing. See *Welch v. Easton Board of Appeals*, No. 94-06 (Housing Appeals Committee Feb 28, 1995)(upholding denial of request to modify existing comprehensive permit to add 62 units to an 74-unit development).

Similarly, we have held that a comprehensive permit may be granted to build housing on a lot that had previously been subdivided subject to a condition that it not be divided further. See *Woodridge Realty Tr. v. Ipswich*, No. 00-04, slip op. at 23 (Housing Appeals Committee Jun. 28, 2001). We noted there that the board of appeals has the same power as the planning board would have to either release a condition or to approve a subsequent plan obviating the condition, so long as there has been a full airing of the issues in a public hearing. Also see *SMI Investors (Delaware), Inc. v. Planning Board of Tisbury*, 18 Mass App. Ct. 408, 414, 466 N.E.2d 525, 529-530 (1984); *Hamilton v. Planning Board of Beverly*, 35 Mass. App. Ct. 386, 388-389, 620 N.E.2d 44, 46-47 (1993).

Finally, we view the Board’s power under the Comprehensive Permit Law as sufficiently broad so that even if a modification of an existing permit were not proper, the Board could entertain an entirely new application to build additional housing on this site.

Such housing would presumably not be permissible under existing zoning, but the essential purpose of Chapter 40B is to permit any and all local restrictions to be overridden under appropriate factual circumstances. See *Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 339, 294 N.E.2d 393 (1973).

Based on the foregoing, and considering the motion before me as though it were a motion to dismiss, I decline to dismiss the instant appeal on the grounds that the Board was acting beyond its legal authority, and we will proceed to a hearing on the merits.

### **MOTION TO INTERVENE**

Prior to the August 30, 2002 conference of counsel, several abutters to the development site filed a "Joint Motion to Intervene." During the conference, the abutters were informed of the Committee's typical practice with regard to such motions, and the Committee confirmed that information by letter of September 3, 2002. The Committee frequently holds motions to intervene by abutters in abeyance and permits them to participate in the hearing as *amici curiae*. To preserve the efficiency and fairness of its hearing process, however, the Committee routinely recommends that the abutters engage counsel. In the case at hand, the Committee also suggested that if the group of abutters chose not to engage counsel, then, because the group includes one or more lawyers, it might choose one of them to act as its spokesperson. Nevertheless, as is their right, the abutters have pressed a request to participate as *amici* without representation, a request which the Committee has not been asked to rule upon before.

The purpose of the Committee's practice of permitting participation by *amici* is two-fold. First, the practice simply expedites the administrative hearing process by obviating the

need for a separate hearing on the motion to intervene and the duplication in the presentation of evidence that may result. More important, the Committee wishes to have the best possible information available when it rules on the motion to intervene. Allowing counsel for the abutters to present the facts underlying their request to intervene as part of the hearing-in-full frequently permits a more thorough development of those facts, while at the same time avoids duplication in the presentation of some of the underlying substantive facts. But keeping the different issues in view during the hearing requires a certain amount of analytic skill on the part of counsel. I am doubtful that the abutters in this case, as unrepresented *amici*, will be able to present such information effectively during the full hearing—either on their own behalf or for the benefit of the Committee.

Therefore, both for the sake of the efficiency of the hearing process and to minimize the disadvantage to the proposed interveners of their being unrepresented, I believe that it is appropriate to rule on the motion to intervene now.

Normally, a brief evidentiary hearing would be necessary to ascertain the facts underlying the abutters' claim. Here, however, under the unusual circumstances presented, we rely on the finding of the Board in its Decision (Petitioner: Equity Residential Properties Trust; Land Affected: Highland Glen Apartments...)(filed with the Weston Town Clerk Jun. 20, 2002). Finding 12 of that decision states:

Because of its height and density, the Project will have a negative impact on the quality of life of the residents of the surrounding neighborhood. ...[P]articularly those who reside... on High Street, Mayfair Drive, and Wildwood Avenue..., will be detrimentally affected by increased noise, congestion, vehicular traffic and lighting, and by the loss of open spaces and privacy. However, these negative impacts, while substantial, do not outweigh the regional need for affordable housing.

Based upon this finding, the following direct abutters will be permitted to participate in the hearing on the merits as parties:

Joanna E. Scannell, 103 Wildwood Drive,  
Nancy Winn, Garrett Winn, 108 Wildwood Drive,  
Raymond Fix, Marla Fix, 91 Wildwood Drive,  
Philip Ryan, 100 Wildwood Drive.

The participation of these parties will be strictly limited to matters concerning which they are "substantially and specifically affected by," and they may not participate with regard to matters of concern to the residents of the neighborhood generally or matters of concern to the town generally. See 760 CMR 30.04(2), 30.04(3). They may participate with regard to issues of noise, lighting, and loss of open space and privacy. They may not participate with regard to issues such as traffic congestion, which is of concern to the neighborhood and town generally, or with regard to financial, programmatic, or monitoring concerns, which are within the province of the Board or the subsidizing agency. See *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 6-7 (Mass. Housing Appeals Committee June 25, 1992); *Stuborn Ltd. Partnership v. Barnstable*, No. 98-01, slip op. at 21-27 (Mass. Housing Appeals Committee Sep. 18, 2002). The interveners may also present suggestions, should the issuance of the modification of the comprehensive permit be affirmed, for conditions to mitigate the impact of construction activities, subject to the requirement that such conditions must be consistent with existing town bylaws or practices concerning construction activities for market-rate development.

Housing Appeals Committee

Date: April 7, 2003



Werner Lohe, Chairman  
Presiding Officer